United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

NO. 74-1336

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FOR THE SECOND CIRCUIT

Nos. 74-1336, 74-1495

LORENZ SCHNEIDER COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application
for Enforcement of an Order of
The National Labor Relations Board

PETITION FOR THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING, AND SUGGESTION FOR REHEARING *EN BANC*

ROBERT SEWELL,
PETER CARRE,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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AUTHORITIES CITED

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PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING, AND SUGGESTION FOR REHEARING *EN BANC*

The National Labor Relations Board respectfully petitions the Court to grant rehearing, and suggests rehearing *en banc*, to reconsider the decision entered by a panel[1] of this Court on April 30, 1974, which grants the Company's petition to review and denies enforcement of the Board's order. For the reasons set forth below, the Board submits that reconsideration is warranted because the panel's decision is contrary to settled principles of law, including precedent in this Circuit.

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[1] Circuit Judges Waterman, Friendly, and Gurfein.

1. In *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 260 (1968), the Supreme Court held that an appellate court on review must accept the Board's finding that certain individuals are "employees," rather than independent contractors, if "it made a choice between two fairly conflicting views." This Court properly applied that standard in *The Herald Co. v. N.L.R.B.*, 444 F.2d 430, 435 (1971), cert. denied 404 U.S. 990, noting with approval Mr. Justice Black's statement in *United Insurance* that, "Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way." While purporting to apply that standard here, we respectfully submit that the panel, in fact, has reweighed the evidence and has displaced the Board's choice between two fairly conflicting views.

2. The Board's finding of "employee" status is based on three factors which, we believe, are sufficient to establish that the Company has reserved a "right of control" over significant aspects of the distributors' work.

(a) The Board found, and the record supports its finding, that the Company effectively controls the prices at which the distributors resell to retailers (A. 398a). Thus, the Company unilaterally establishes the prices it charges distributors for their merchandise, and the distributors have no freedom of pricing with respect to chain stores[2] since the prices at which the latter buy the merchandise are fixed in direct dealings between the chain's buyer and the manufacturer (A. 398a; 106a-112a). With respect to independent store routes, some independent stores combine with other stores into store associations or "cooperatives" that deal with

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[2] Contrary to the assertion of the panel that these stores comprise only 40 percent of the total accounts (sl. op. 3283), the record shows, as the Board found, that chain stores make up the entire business of approximately 30 of the 52 distributor routes (A. 398a; 112a).

the manufacturers directly and thus receive the same fixed prices and rebates as chain stores (A. 398a; 204a-205a, 275a). In addition, the prices that distributors may charge the remaining independent stores is effectively limited by the Company's frequent advertisement in trade publications of price discounts on the distributors' merchandise and in some cases by its direct notice to independent stores of such price reductions (A. 398a; 167a-172a, 176a-177a, 180a-181a, 183a-184a). Indeed, where distributors have attempted to refuse to grant these discounts to independent stores, the customers, by refusing to make further purchases, have forced distributors to grant the discounts (A. 398a; 76a-77a).[3]

(b) The Board also found, and the record supports its finding, that the Company was able to exercise control over the operating procedures of distributors. Thus, the distributors' contract with the Company binds them to abide by the Company's "Book of Procedures for Operating Distributor Routes," which regulates such significant matters as the amount of shelving distributors must install at their own expense in customers'

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[3] The panel suggests (sl. op. 3284) that such advertising does not affect the distributors' price levels because only the amount of the reduction is conveyed and not the regular price upon which the reductions operate. However, the record reveals that in some instances actual merchandise prices are conveyed, and, in any event, the customers clearly know what the regular merchandise prices are from their constant dealings with distributors (A. 398a; 167a-171a, 176a-177a, 180a-181, 183a-184a). Furthermore, the Board found that the Company discourages the distributors from varying the prices they charge independents by warning the distributors, through memoranda, that they were bound to charge uniform suggested merchandise prices by federal government regulations under the Robinson-Patman Act and that, if they failed, they would be faced with prosecutions and treble damage suits (A. 375a; 276a). Finally, the panel's suggestion (sl. op. 3284) that distributors have an opportunity to "maximize profits by greater efficiency, better salesmanship, or added accounts" is belied by the uncontradicted record evidence that distributors are prohibited by their contract from soliciting business outside the area serviced by the Company, and are also barred from soliciting so-called "protected accounts" (stores already serviced by one of the several other companies also distributing the same products in the Company's franchised area) (A. 373a; 123a-126a, 152a).

stores, the frequency and extent of servicing of distributors' accounts, and the times when distributors must load their merchandise at the Company warehouse (A. 398a; 63a-66a, 102a, 127a-129a, 137a-138a, 149a-150a, 222a-230a, 239a-240a, 256a-257a, 334a, 336a; E. Exh. 12, U. Exh. 13).

(c) Finally, the Board found, and the record supports its finding, that the Company employs distributor representatives who in a number of significant ways – such as unilaterally resolving disputes between distributors and their customers and instructing distributors on how to properly service accounts – oversee the operations of distributors (398a-399a; 87a-95a, 116a-118a, 155a, 233a-237, 269a-270a; U. Exh. 10).

3. On the basis of the above facts, the Board could reasonably have concluded, as it did, that the distributors were "employees," rather than independent contractors. The panel thus should not have disturbed the Board's conclusion. Instead – although it conceded that "We cannot say that here the Board had no basis for its conclusion" (sl. op. 3289) – it proceeded to reweigh the evidence and substitute its view of the evidence for that of the Board. This, we submit, was an excess of its reviewing authority.

Thus, there is no record support for the panel's finding that a distributor "can and does charge whatever the traffic will bear" to independent stores (sl. op. 3283). And, as shown (n. 3, *supra*), the panel's further assumptions with respect to the distributors' pricing freedom vis-a-vis the independents is not supported by the record as a whole. At minimum, the Board's evaluation of the record in this regard was as reasonable as that of the panel, and thus should have been accepted. Furthermore, the panel minimizes the facts respecting the Company's oversight of the distributors' operations because "We do not find these facts to be so significant

as the Board" (sl. op. 3286), and because "We do not think [the Company's] supervision of the distributors . . . points very high on the employer-employee scale" (sl. op. 3287). However, as the Supreme Court made clear in *United Insurance*, the question is not how the reviewing court would have weighed the various factors had it been free to determine the matter *de novo*, but whether the Board could reasonably have weighed them as it did. Had the panel properly applied this test, it should have sustained the Board's finding of employee status here.[4]

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[4] The facts of the state court cases relied on by the panel (sl. op. 3290) are wholly different from those here:

> *Hilyar* ("The uncontradicted facts show a wholesaler-retailer relationship," the only evidence to the contrary being the distributor's statement to the police officer that he was " 'employed' by the Union Ice Company". 286 P.2d at 28.)
>
> *Batt* (" 'Primarily, the contract is one of purchase and sale whereby [the Company] agrees to sell and [the distributor] agrees to purchase an indefinite number of [the Company's] newspapers at a specified price per hundred.' " 218 P.2d at 218.)
>
> *Skelton* ("Clearly the contract upon its face was for the accomplishment of a definite result through means and methods completely under the control of Graffio and without any reserved right in Fekete to exercise any control thereover." 261 P.2d at 344.)
>
> *Skidmore* ("Haggard bought papers from the Star to resell them at a profit to people living in his territory outside of towns. He paid the Star for them whether he was paid or not. . . . [H]e changed his route to be able to sell to new customers; employed a carrier to deliver to a group living close together at one point . . . took over additional selling territory . . . and otherwise conducted his activities with relation to individual subscribers as an independent business." 110 S.W.2d at 730, 731.)

CONCLUSION

For these reasons, the Board respectfully prays that rehearing, or rehearing *en banc* be granted, and that, upon such rehearing, the Court enforce the Board's order in full.

ROBERT SEWELL,
PETER CARRE,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
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May 1975

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed petition for rehearing in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Proskauer, Rose, Goetz &
Mendelsohn
300 Park Avenue
New York, New York 10022

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 21st day of May, 1975.